No. 84-231

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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ALVIN D. HOOPER AND MARY N. HOOPER,
*Appellants,*

v.

BERNALILLO COUNTY ASSESSOR,
*Appellee.*

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**On Appeal from the Court of Appeals of the State of New Mexico**

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## BRIEF FOR APPELLEE

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## QUESTION PRESENTED

Whether a New Mexico statute, granting a tax preference to veterans who resided in the State at the time of entering or leaving wartime service, is unconstitutional because it does not extend the same preference to veterans who resided elsewhere at the time established for determining eligibility.

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## BRIEF FOR APPELLEE

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### STATEMENT

Appellants, Alvin D. Hooper and his wife, have challenged the denial to them of a tax exemption provided to certain Vietnam veterans by Section 7-37-5C(3)(d) of the New Mexico Statutes. N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983). The New Mexico Court of Appeals held that the statute did not infringe either appellants' right to travel or their rights to equal protection and due process under the Fourteenth Amendment. J.S. App. B1-B22. The Supreme Court of New Mexico denied a petition for certiorari. J.S. App. A1-A2.

The facts are straightforward. Section 7-37-5C(3)(d) provides that certain property owners in New Mexico may claim an exemption of Two Thousand Dollars ($2,000.00) from their total property valuation for tax

purposes if they meet several specified conditions. First, they must have served in the United States military during the Vietnam War for a period of at least 90 continuous days. Second, they must be a current resident of New Mexico. Third, and the condition at issue on this appeal, they must have been a resident of New Mexico prior to May 8, 1976. That date is one year from the date on which American troops in Vietnam were withdrawn. J.A. App. B15-B16.

New Mexico provides the same benefit for veterans of other wars upon similar conditions. In every situation, the applicant must have served for 90 continuous days "during a period of armed conflict" and must be a current resident of New Mexico. In addition, World War I veterans must have been residents of New Mexico prior to January 1, 1934; World War II veterans must have been residents prior to January 1, 1947; and Korean War veterans must have been residents prior to February 1, 1955. N.M. Stat. Ann. § 7-37-5 (1978).

Although the conditions for Vietnam veterans now correspond to the conditions for veterans of other wars, it was not always so. The initial statute extending an exemption to Vietnam veterans required that the veteran have been a New Mexico resident prior to "entering the armed services from New Mexico" and also that the veteran have been "awarded a Vietnam campaign medal for services in Vietnam" during a prescribed period. 1973 N.M. Laws, Ch. 258, at 1052. The statute was then amended in 1975 to eliminate the requirement of a medal but retained the condition that the veteran have entered the armed services from New Mexico. 1975 N.M. Laws, Ch. 3, at 11.

The statute was amended again in 1981, dropping the requirement that the veteran have entered the armed services from New Mexico. The new statute extended the tax exemption to any Vietnam veteran who "was a New Mexico resident prior to * * * May 8, 1975," regardless



of his residence when he entered the service. 1981 N.M. Laws, Ch. 187, at 1078. The statute was amended a third time in 1983, providing the exemption to any Vietnam veteran "who was a New Mexico resident prior to * * * May 8, 1976." 1983 N.M. Laws, Ch. 330, at 2112.

Appellant Hooper concededly does not meet the requirements of the statute. Although he is a current resident of New Mexico and served for 90 continuous days during the Vietnam war, he did not come to New Mexico before the eligibility date of May 8, 1976. Appellants, in fact, did not move to New Mexico until more than five years after the date specified for eligibility. J.S. App. B3.

Appellants nonetheless sought to claim the exemption, arguing that the eligibility date was unconstitutional. Appellee, the Bernalillo County Assessor, denied the claim because appellants did not satisfy the statutory conditions. A protest to the Bernalillo County Valuation Protests Board was subsequently rejected on the same grounds. J.S. App. B2.

The New Mexico Court of Appeals affirmed the denials. Disagreeing with appellants' contention that the statute burdened their right to travel, the court noted that the statute did not affect "such fundamental interests as voting, welfare benefits, or public medical assistance." J.S. App. B7. The court observed: "Denying such rights to new citizens even temporarily would penalize new residents and deter migration because those persons who contemplate moving interstate have reasonable expectations that such necessary, essential rights will be available. A veteran's property tax exemption is not such a right." J.S. App. B8.

The court also held that the statute did not violate appellants' right to equal protection. Looking at whether the statute "reflects legitimate state purposes" and "bears a reasonable relationship to those purposes," the court found that "[a] state's interest in expressing gratitude

and rewarding its own citizens for honorable military service is a rational basis for veterans' preferences." J.S. App. B15. The court went on to conclude that, while "[t]he legislature is entitled to reward and encourage veterans to settle in New Mexico, * * * it is also entitled to limit the period of time within which they may choose to establish residency." J.S. App. B16-B17.

The court of appeals distinguished the New Mexico statute from the more expansive statute challenged in *Zobel v. Williams*, 457 U.S. 55 (1982), noting that "[t]he statute at issue here extends a tax benefit not to *all* bona fide residents, but to a small class of New Mexico veteran residents." J.S. App. B18-B19 (emphasis in original). As a result, the court said, "[t]his classification scheme does not favor long-term residents as a class over those who have recently exercised their right to travel." J.S. App. B19. Instead, "[t]he legislature here extended a benefit to a specific class of New Mexico veteran residents in a manner that is rationally related to legitimate state interests." J.S. App. B19.

## SUMMARY OF ARGUMENT

The New Mexico statute at issue in this case. N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983), provides a legitimate veterans benefit to veterans present in the State during a critical period. It does not violate appellants' right to travel or right to equal protection.

1. The State of New Mexico provides to a limited number of New Mexico residents a benefit denied to most New Mexico residents, regardless of the length of their residency. The State, in seeking to reward this particular class of veterans, had no intent to deter new residents (or new veterans) from entering New Mexico. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). Nor does the denial of the benefit—a modest tax exemption—act as a barrier to, or substantial penalty on, a significant class of persons wishing to travel. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The proper test to be applied, therefore, is the rational basis test. See pages 7-13 *infra*.



2. The New Mexico statute rationally rewards veterans who spent the difficult years immediately before or after their Vietnam service in New Mexico. The State may recognize the special contributions made, and the problems faced, by veterans in time of war, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and it may extend appropriate benefits to veterans who were in New Mexico at the most difficult times. *August v. Bronstein*, 369 F. Supp. 190 (S.D.N.Y.), *summarily aff'd*, 417 U.S. 907 (1974). The statute here does not assign appellants to a "second-class citizenship," see *Zobel v. Williams*, 457 U.S. 55 (1982), but simply recognizes that they were not present in New Mexico when the specific conditions justifying the exemption existed. See pages 13-24 *infra*.

3. If the Court nonetheless finds the statute unconstitutional, it should remand the severability issue to the New Mexico state courts. Alternatively, it should hold that the provision challenged here is not severable. See pages 24-26 *infra*.

## ARGUMENT

The familiar rule, in reviewing state legislation challenged on equal protection grounds, is that legislation will be struck down only if "it is without any reasonable basis, and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). While virtually any legislation affects certain persons differently from others, the proper inquiry is not whether the classifications are inexact but whether they cause "different treatments * * * so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). When the classification concerns "a noncontractual bene-

fit under a social welfare program," a State violates the equal protection clause "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

This Court has made clear that such deferential review is not to be evaded by caviling over rationality. "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Rather, the courts must "defer[] to legislative determinations as to the desirability of particular statutory discriminations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Confronted by these resiliant principles, appellants here take two unsurprising courses. First, they say that the classification is not rational, arguing that distinctions among veterans based upon date of residency in New Mexico are simply arbitrary. Second, they contend that, in any event, the courts must apply a test of strict scrutiny because the statute penalizes the right to travel. Neither argument withstands analysis.

Taking appellants' points in reverse order, we think it evident that the New Mexico statute does not seek to, and does not, burden the right to travel in any meaningful sense. Rather, New Mexico provides, as many other states have done, a modest bonus (here, a tax exemption) to veterans leaving the State for wartime service or relocating there immediately thereafter. In so doing, the State has chosen a cutoff date for determining eligibility, a date that is rationally related to the purpose of aiding particular veterans leaving or returning to the State at times of conflict and not just veterans generally. This Court should not prohibit the State from making that legitimate choice.



**1. The New Mexico Statute Does Not Burden the Right to Travel.**

Although appellants treat the issue as a secondary one, we think that the initial question before the Court is the standard of review to be applied to this tax statute. Appellants contend that the statute, even if supported by a rational basis, must fall because it burdens the right to travel.[1] We disagree.

Although the right to travel is by now well-recognized, little about it is free from controversy. To begin with, of course, its origins remain a matter of continuing dispute. See *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982); *id.* at 66-67 (Brennan, J., concurring); *id.* at 71-74 (O'Connor, J., concurring). Over time this Court or various of its members have attributed the right to the Commerce Clause (*e.g.*, *Edwards v. California*, 314 U.S. 160 (1941)); the Privileges and Immunities Clause of Article IV (*e.g.*, *Zobel v. Williams*, *supra*, 457 U.S. at 73-74 (O'Connor, J., concurring)); the Privileges and Immunities Clause of the Fourteenth Amendment (*e.g.*, *Edwards v. California*, *supra*, 314 U.S. at 177, 181 (Jackson and Douglas, JJ., concurring)); and the Due Process Clause of the Fifth Amendment (*e.g.*, *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958)). Despite this range of opinions, the Court, in the end, has found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

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[1] This Court has held that, in cases where a substantial burden is placed upon the right to travel, the State must justify the burden with a compelling State interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969). More recently, the Court has noted that "right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (holding that Alaska statute failed the rational basis test). Because we believe that New Mexico has not burdened the right to travel, we will assume *arguendo* that a higher standard would be required if it had.

The dimensions of the right are, likewise, the subject of some uncertainty. Carried to its logical extreme, the right to travel could be held to invalidate fees or tolls imposed on interstate movement (see, *e.g.*, *Shapiro v. Thompson*, *supra*, 394 U.S. at 648-49 (Warren, C.J., dissenting)) or to prevent any State from conducting activities that a potential resident thought undesirable.[2] But this Court has never extended the right to such lengths. While the Court has struck down deliberate attempts to fence out new residents (*e.g.*, *Edwards v. California*, *supra*) and has prohibited the denial of important rights and benefits based on recent travel (*e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)), it has never held that new residents have an unqualified right to any state benefit enjoyed by prior residents. See, *e.g.*, *Sosna v. Iowa*, 419 U.S. 393 (1975); *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily aff'g* 326 F. Supp. 234 (D. Minn. 1970) (three-judge court); *Sturgis v. Washington*, 414 U.S. 1057, *summarily aff'g* 368 F. Supp. 38 (W.D. Wash. 1973) (three-judge court); *Sununu v. Stark*, 420 U.S. 958 (1975), *summarily aff'g* 383 F. Supp. 1287 (D.N.H. 1974) (three-judge court).[3]

Whatever the precise contours of the right to travel may be, however, we are confident that the statute in this case does not burden it. If the current right to travel is to bear any relation to its theoretical underpinnings, and not merely serve as a pretext to override concededly ra-

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[2] This Court has observed that "[e]ven a bona fide residence requirement would burden the right to travel, if travel meant merely movement." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974). But this Court has held that residency requirements do not violate equal protection. See *Martinez v. Bynum*, 461 U.S. 321 (1983), and pages 18-19 *infra*.

[3] This Court has also held that a State may restrict a resident's right to travel because of his own misconduct. See *Jones v. Helms*, 452 U.S. 412, 417-23 (1981).



tional state legislation, it should be invoked to invalidate legislation only when that legislation seeks to, or actually does, significantly burden "the right to travel from one state to another * * *." *United States v. Guest*, 383 U.S. 745, 757 (1966). In making that determination, the courts must look to, among other things, the purpose of the legislation, the rights or benefits at stake, and the persons divided into the favored and disfavored classes. See, *e.g.*, *Shapiro v. Thompson*, *supra*; *Dunn v. Blumstein*, *supra*; *Memorial Hospital v. Maricopa County*, *supra*. The ultimate question is simply whether the States, in a practical sense, have "penalize[d] those persons * * * who have exercised their constitutional right of interstate migration * * *." *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of Brennan, White, and Marshall, JJ).

At the outset, therefore, we note that appellants do not, and reasonably could not, allege that the New Mexico statute was passed for the *purpose* of deterring migration to New Mexico. To the contrary, the very existence of the statute evidences that New Mexico has a high regard for veterans who have served in time of war, since it extends to many of them a benefit not enjoyed at all by nonveterans. The statute thus stands in stark contrast to the statute in *Edwards v. California*, *supra*, by which California had sought expressly to deter an influx of indigents into the State. See 314 U.S. at 171. Noting that unmistakable purpose, the Court in *Edwards* disapproved "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.* at 173. Similarly, in *Shapiro v. Thompson*, *supra*, the Court struck down a durational residency requirement for the receipt of welfare benefits, noting "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions." *Id.* at 628. The Court

stated flatly: "[T]he purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." *Id.* at 631. See *Cole v. Housing Authority of Newport*, 435 F.2d 807, 812 (1st Cir. 1970) (purpose of "inhibiting migration by needy persons into the State").

Although the absence of an impermissible purpose does not end the inquiry, it nonetheless merits considerable weight. While a State may burden the right to travel without expressly setting out to do so, see *Dunn v. Blumstein, supra*, 405 U.S. at 339-41, it is purposeful exclusion that poses the most serious threat to "the principle of free interstate migration, and * * * its role in the development of the Nation." *Zobel v. Williams, supra*, 457 U.S. at 67 (Brennan, J., concurring). In cases where barriers are deliberately created, the State is setting out to do what it absolutely may not do; in other cases, however, the State is likely to be pursuing wholly legitimate goals through classifications that are challenged, as many state classifications are challenged, as being impermissibly broad or narrow. In such circumstances, like those in this case, the line between right-to-travel analysis and garden-variety equal protection analysis is likely to be far less distinct.

Where no improper purpose exists, therefore, litigants relying on the right to travel should, at a minimum, be able to point to some serious *effects* on the right arising from the statute. No such effects can be shown, or even imagined, in this case. Although appellants halfheartedly claim that the tax exemption at issue "is clearly significant to most citizens," Appellants' Brief at 67, it would stretch credulity past the breaking point to say that decisions about residence in New Mexico could actually turn on the availability of this particular exemption. Indeed, as we discuss below (pages 12-13 *infra*), the exemption is not one that is available to most current citizens of



New Mexico or to most prospective residents of New Mexico, because they are not veterans. Most decisions about residence in New Mexico must necessarily be made without regard to eligibility for the exemption.

This situation is thus, once again, very different from the conditions in other cases reviewed by this Court. Potential New Mexico residents are not being told that they must do without welfare benefits (*Shapiro v. Thompson, supra*), the right to vote (*Dunn v. Blumstein, supra*), or important medical benefits (*Memorial Hospital v. Maricopa County, supra*) while their allegiance to the State is being tested. Denial of "a basic necessity of life," whether done to deter travel or not, will plainly act either to inhibit migration or exact a serious penalty from those choosing to migrate anyway. See *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 258-261. But neither the deterrence nor the "penalty" is of the same dimension when the benefit is one of the hundreds of preferences and exclusions built into the taxing structure of any State.[4] It is entirely logical, therefore, that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 259; see J.S. App. B7-B8.[5]

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[4] On an elemental level, any distinction among residents based on the time or duration of residence could be said to "penalize" travel. But this Court has said on several occasions that some "waiting period[s] * * * may not be penalties." *Shapiro v. Thompson, supra*, 394 U.S. at 638 n. 21; *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 258-59. A reviewing court thus must consider "the extent to which the residence requirement served to penalize the exercise of the right to travel." *Memorial Hospital v. Maricopa County, supra*, 415 U.S. at 257 (emphasis omitted).

[5] In *Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1974), relied on by appellants (Appellants Br. at 35-36), the court of appeals noted that the benefits at issue—defined to include "food, shelter and necessities to a needy family"—were the claimants' "only source of

Apparently recognizing that no real effect on travel is involved in this case, appellants turn to the position that an infringement on the right to travel need not involve any infringement on travel itself. Appellants Brief at 61 ("no actual deterrence to travel or migration is required"). While we agree that this Court has not required plaintiffs claiming a right to travel to show that they themselves were deterred or to introduce evidence that some other class of potential travelers was deterred, see *Dunn v. Blumstein, supra*, 405 U.S. at 340-41, it would trivialize the right to travel to say that no burden at all on travel must be present. The strict scrutiny required by the right to travel should be applied only when some class of potential travelers could reasonably regard the loss of a particular benefit (such as welfare payments or medical care) as substantial enough to raise more than a *de minimis* barrier to travel. As this Court has demonstrated, where no such possible burden exists, traditional equal protection analysis is fully adequate for review of classifications among residents of a particular state. *Zobel v. Williams, supra.*

We also think it relevant that the classification involved here, unlike those in *Shapiro*, *Dunn*, and *Memorial Hospital*, is not one favoring all, or even most, current residents of the State. The tax exemption is, instead, a benefit intended just for veterans, in particular those veterans for whom New Mexico assumed a special responsibility through and immediately after the Vietnam war. See pages 16-22 *infra*. Many persons who have lived in New Mexico all their lives do not qualify for the exemption; others with far shorter periods of residence in the State do qualify. The deciding characteristic is not the extent of allegiance to the State but dependence on the State

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subsistence aid." *Id.* at 422. The court thus concluded that the benefits were indistinguishable from the welfare benefits in *Shapiro v. Thompson, supra*, and could not be conditioned on a three-year residency requirement.



during a period when veterans had a special claim for recognition.

This point is significant for several reasons. First, as we have remarked, it undercuts the notion that the exemption is an important influence on the decision whether to live in New Mexico or any suggestion that it is seen as creating two general classes of citizenship. Furthermore, it defuses the possible concern that older residents are discriminating politically against yet-to-be residents without a political voice. The statute, in fact, grants a benefit to a small class of existing New Mexico residents and simultaneously denies it to a much larger number of existing New Mexico residents. When the majority of old residents elect to treat themselves in the same fashion as the excluded newer residents, there is little likelihood that the benefits denied to them will be "basic necessities of life" or other substantial advantages.

The New Mexico statute, in short, does not try to deter new residents, cannot realistically be thought to deter new residents, and excludes many older residents from a benefit given to many newer ones. As such, it poses no meaningful barrier to the right to travel or the structure of our Nation. If it rests upon a rational basis, it should be upheld.

**2. The Tax Exemption Rests Upon a Rational Basis.**

Before turning to the statute at issue, we note that the deference to state judgments implicit in the rational basis test is even more pronounced with regard to taxing enactments. As this Court has observed, "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the Na-

tional Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959).

These principles are squarely grounded in principles of federalism. This Court has often recognized that "the entire Country is made up of a Union of separate State governments * * * and that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Few decisions can be closer to the core of state sovereignty than the decisions regarding how to allocate tax burdens among various groups. Those decisions inevitably depend upon political choices that are almost uniquely suited for legislative, rather than judicial, assessment. Indeed, this Court, in limiting federal-court challenges to state taxing policies, has specifically emphasized "the important and sensitive nature of State tax systems." *Fair Assessment in Real Estate Ass'n v. McNary*, 455 U.S. 100, 102 (1981).

While appellants apparently do not dispute these principles, they nonetheless claim that the New Mexico statute is arbitrary because it creates a "second-class citizenship" for veterans coming to New Mexico after May 7, 1976. Appellants' Brief at 28. According to appellants, the decision of this Court in *Zobel v. Williams*, *supra*, prohibits the State from distinguishing between veterans leaving or returning to New Mexico during wartime and veterans who spent those unusually difficult years elsewhere. See generally Appellants' Br. at 25-53. This view, however, both distorts the effect of the New Mexico statutory scheme and misperceives the proper extent of the relationship between a State and its own citizens.



**a. *New Mexico May Choose to Assist Returning Veterans.***

It is necessary, in assessing whether a statute rests upon a rational basis, to examine with some care just what the statute does. The statute in the present case, N.M. Stat. Ann. § 7-37-5C(3)(d) (1978) (Repl. Pamp. 1983), embodies a basic policy followed by New Mexico for more than half a century: to give financial assistance to veterans who lived in New Mexico prior to a time of war or returned to New Mexico shortly thereafter. The policy was first set forth in 1933 for World War I veterans with an eligibility date of January 1, 1934. Similar assistance was provided to World War II veterans settling in New Mexico prior to January 1, 1947, and to Korean War veterans arriving before February 1, 1955. Although the New Mexico legislature first granted assistance to Vietnam veterans only if they "enter[ed] the armed services from New Mexico and [were] awarded a Vietnam campaign medal for services in Vietnam" during a designated period, it later modified the statute to conform the policy to that followed for other wars. See pages 2-3 *supra*.

There is nothing irrational, indeed nothing unusual, about a statute that rewards returning veterans. Despite appellants' implicit suggestion that the State is off on a frolic of its own, New Mexico is but one of at least 26 States that now have, or have had, a policy of giving bonuses or other assistance to returning veterans. *See, e.g.*, Staff of House Comm. on Veterans' Affairs, 98th Cong., 2d Sess., State Veterans' Laws 309-311 (Comm. Print 1984). Most statutes provide the assistance in the form of cash bonuses, graduated in amount according to length of service. Two states, however, New Mexico and Wyoming, provide a continuing tax exemption in lieu of a direct bonus. See Wyo. Stat. § 39-1-202.

While the eligibility requirements for such assistance vary from state to state, it is noteworthy that the re-

quirements imposed by New Mexico are the least restrictive of all. For several States, the basic requirement is that the veteran have been a bona fide resident at the time of his entry into the service. *See, e.g.*, 51 Pa. Cons. Stat. Ann. §§ 20122-20123. Many States establish a stiffer test, however, imposing a condition of residence for six months or, in some cases, a year prior to entry. *See, e.g.*, Ky. Rev. Stat. § 40.005 (6 months); Ill. Rev. Stat. Ch. 126½, § 57.52 (1 year). A few States expressly provide that no bonus shall be paid to veterans receiving a bonus from another State or that the amount of other bonuses shall be deducted. *See, e.g.*, Ill. Rev. Stat. Ch. 126½, § 57.52. New Mexico, in contrast, grants its assistance to any veteran who was a resident at the time of entering service, any veteran who was a resident prior to the time of entering service whether he entered the service from New Mexico or not, and any veteran who returned to the State from the war before a certain date, even if the veteran in question had been eligible for and received a bonus from another State.[6]

These benefits are based on the traditional, and entirely reasonable, notion that veterans deserve special thanks and special help. Indeed, courts have generally required little in the way of justification for veterans' benefits, evidently believing, as one court said, that "it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary." *August v. Bronstein*, 369 F. Supp. 190, 193 (S.D.N.Y.), *summarily aff'd*, 417 U.S. 901 (1974). This Court has recently noted that "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Taxation*

[6] This case thus does not involve a requirement of residency at a particular point in time *and* a durational residency requirement. See *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980) (striking down 10-year durational residency requirement but upholding requirement of residence at time of entry into the service).



*With Representation of Washington*, 461 U.S. 540, 551 (1983). The Court stated flatly: "This policy has 'always been deemed to be legitimate.'" *Id.*, quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 n.25 (1979). See also *Johnson v. Robison*, 415 U.S. 361 (1974).

It is true, of course, that New Mexico does not give its tax benefit to all veterans, but rather to those veterans who had established ties to the State before May 8, 1976. But that distinction rests on two eminently rational assumptions: first, that veterans on the point of picking up or laying down the burdens of war have a different claim to benefits than veterans further removed from such unsettling times; and, second, that New Mexico has a special responsibility to those veterans who picked up and laid down the burdens while residents of the State.

With regard to the first of these assumptions, even a cursory sense of history would suggest the particular strains felt by servicemen as they leave, or just after they return to, civilian life. This Court has pointed out that "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation * * *, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Regan v. Taxation With Representation of Washington, supra*, 461 U.S. at 550-51 (internal quotes and citations omitted). See also *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980). As Judge Friendly has noted, the various preferences for veterans are grounded in a "[d]esire to compensate in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces and to express gratitude for such service * * *." *Russell v. Hodges*, 470 F.2d 212, 218 (2d Cir. 1970). It stands to reason that the effects of that disruption are likely to be at their most severe at the point of entry into the service and at the

point of return.[7] And, for the most part, it is veterans in that class to whom the New Mexico benefit is granted.

The eligibility date in this case thus works very differently from a durational residency requirement. In the latter case, the inquiry turns upon the *length of time* that one has been a citizen of the State; here, by contrast, the inquiry turns upon the *point in time* when one was a citizen. See *Langston v. Levitt*, 425 F. Supp. 642, 646 n.6 (S.D.N.Y. 1977). The group of veterans entering and leaving the service before May 8, 1976, faced problems while in New Mexico that later arrivals simply did not. By the time this latter class of veterans had migrated to New Mexico, they had already had the opportunity to readjust to civilian life in other States, including the opportunity to receive whatever benefits those States provided to returning veterans immediately following the war.[8]

Turning to the second assumption underlying the statute, we see no constitutional defect in the recognition that New Mexico has a different relationship with the departing or returning veterans within its borders than with veterans who turned to other States. The very nature of state sovereignty means that States, in many instances, may treat their own citizens differently from citizens of other States.[9] As this Court's decisions upholding bona

[7] To ease the transition, and to avoid additional sacrifice arising from military service, many States provide that returning veterans must be restored to their previous jobs and that various deadlines applicable to other state citizens are to be extended. *See generally* State Veterans Laws, *supra*, 1-306.

[8] Indeed, it is likely that some veterans coming to New Mexico after the cutoff date had received bonuses from other States to help them with the adjustment to civilian life following the war.

[9] Different considerations apply when a State denies nonresidents a basic right of national citizenship rather than a benefit created and funded by the State. See *United Buildings and Construction Trades Council of Camden County v. Mayor and Council of the*



fide residency requirements make clear, a State need not disburse its benefits generally throughout the Nation but may provide them exclusively to its own citizens. See, *e.g.*, *Martinez v. Bynum*, 461 U.S. 321 (1983); *Plyler v. Doe*, 457 U.S. 202 (1982). No one would seriously question that a State can provide its own citizens with free public services or welfare benefits, simply because they are citizens, without becoming obliged to provide them to citizens of other States as well. As this Court has stated, "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Martinez v. Bynum*, *supra*, 461 U.S. at 328.

These principles cannot be realistically applied, however, without an awareness that both the pool of citizens within a State and the conditions attacked by state programs change over time. If they are to respond to changing circumstances, therefore, States must be able to extend benefits to residents at one time that they do not extend to residents at other times. For example, a State may sensibly decide to grant low-interest loans to its residents in a year of tight money and not grant them to its residents in later years when the need for state support is different. While that policy would mean in practical terms that residents not present in the earlier years would not be receiving benefits still enjoyed by some older residents, it would seem well within the limits of the equal protection clause. The alternative would be to put States to the Hobson's choice of either extending programs indefinitely or retroactively depriving residents of benefits previously granted them. See *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303-06 (upholding a grandfather clause al-

*City of Camden*, 104 S.Ct. 1020 (1984); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948).

lowing certain established vendors to operate while abolishing newer ones).

We thus have little doubt that New Mexico could have declared a benefit on May 7, 1976, for all its then-resident veterans, whether in the form of a one-time cash bonus, or a bonus payable in installments, or a tax exemption over a period of years, without being obligated to pay the same benefit to any veteran who showed up five years later. See, *e.g.*, *Langston v. Levitt*, *supra*, 425 F. Supp. at 646 ("Numerous federal courts have recognized that a state's interest in expressing gratitude and rewarding its own citizens for their honorable military service is a rational basis for veterans' preferences * * *").[10] The fact that the benefit was awarded retroactively to the same class of veterans does not make it any less valid. The question in each case is simply whether New Mexico could rationally believe that resident veterans in 1976 had a claim distinguishable from veterans arriving later.[11] Appellant Hooper would have had no legitimate complaint if the State had paid a bonus to all veterans returning to New Mexico before May 8, 1976, even though Hooper (having gone elsewhere) would not have gotten one. Nor would he have been entitled, as a matter of equal protection, to demand one by showing up five years past the deadline. He simply was not in New Mexico when the

[10] The court in *Langston* cited the following cases: *Rios v. Dillman*, *supra*; *Russell v. Hodges*, *supra*; *White v. Gates*, 253 F.2d 868, *cert. denied*, 356 U.S. 973 (1958); *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976) (three-judge court); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgan v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *summarily aff'd*, 410 U.S. 976 (1973).

[11] This view is especially appropriate here because the State, in amending the statute in 1981 and afterwards, did nothing more than apply to Vietnam veterans the same general standards already applied to veterans of other wars. It would be perverse to prevent the State from correcting an inequity on the ground that the time of entering and leaving the service had passed.



conditions justifying the exemption were deemed to exist. See *Lambert v. Wentworth*, *supra*, 423 A. 2d at 534 (tax exemption for veterans entering service from Maine "must be viewed as expressing the State's gratitude to that class of veterans most worthy of its bounty because of their citizenship status *at the time they interrupted their economic lifestyle in answering the call to patriotic duty*") (emphasis added).[12]

The statute in this case thus does not present the same problems as the statute in *Zobel v. Williams*, *supra*. In apportioning cash distributions solely on the basis of length of residency in the State, Alaska made no effort to respond to the particular conditions faced by residents at a particular time. Rather, it offered only the generalized explanation that the statute "reward[ed] past contributions," apparently tax contributions in leaner years.[13] As this Court observed, however, that rationale "could open the door to state apportionment of other rights, benefits and services according to length of residence." *Id.* at 64. The effect was thus to create a true second-class citizenship.

The New Mexico statute, by contrast, recognizes the circumstances faced by its own citizens as veterans, particularly as they uprooted their normal lives to enter the service. As we previously have noted, this Court itself has

[12] For the same reasons, there is no merit to appellants' argument that New Mexico has wrongfully applied an irrebuttable presumption against them. Appellants' Br. at 73-77. New Mexico has simply tried to help a particular class of veterans, a class to which appellant Hooper indisputably does not belong. Appellants' argument is that New Mexico cannot choose to help that particular class alone, not that Hooper should have a chance to prove his right to be included in it.

[13] It is readily apparent that the duration of residence bears no real relationship to the amount of taxes paid. Thus, even without regard to the purpose of the legislation, it is doubtful that the use of residency as a surrogate for contributions could have been sustained. See 457 U.S. at 63 n.10.

acknowledged the problems that service often entails. *Regan v. Taxation With Representation of Washington, supra*, 461 U.S. at 550-51. Moreover, it has summarily affirmed *state* recognition of such circumstances, even though the State limited its compensation to its own veterans. *August v. Bronstein, supra.* In *August*, a case involving an employment preference for veterans, the district court had upheld a requirement of residency when entering the service, observing: "The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the State thereafter." *Id.* at 193. The court found that the grant of a "modest veterans' preference" was "substantially related to the purpose of the State." *Id.*

Finally, we note that the benefit conferred is by no means disproportionate to the State purpose. It is a modest financial preference, not an exclusive claim on essential state services. In short, New Mexico has given reasonable help to veterans who, as its citizens, were dependent on it during a time of upheaval in their lives. That gesture is comfortably within the tolerable limits of the equal protection clause.

**b. *The Use of An Eligibility Date is Not Impermissible.***

The means chosen by New Mexico to accomplish its purpose were also permissible. Contrary to appellants' contention, the equal protection clause does not prohibit the use of a fixed date to determine eligibility.

To begin with, the date itself is not unrelated to the purposes of the statute. Although appellants argue that the date selected is "purely arbitrary," Appellants' Brief at 52, the date is directly related to the end of hostilities in Vietnam. As the New Mexico Court of Appeals noted, the date of May 8, 1975, one year before the current eligibility date in the statute, is the date "of the final U.S. troop withdrawal" from Vietnam. J.S. App. B15-B16. Its use



as a benchmark for the difficulties of returning to civilian life is by no means far-fetched.

Appellants' real grievance thus appears to be not with the use of this particular date, but with use of a date for eligibility at all. The initial problem with this approach is that it knows no limits. It is, of course, common practice for Congress and state legislatures to set eligibility dates for various programs.[14] Indeed, given the fact that programs and conditions inevitably change, it is difficult to see how some programs could exist without the use of eligibility dates.

The second problem with appellants' complaint is that it demands a precision in creating classifications that this Court has found to be unnecessary. It is, of course, apparent that residency before May 8, 1976, does not bear an exact correlation with the general purpose of aiding returning veterans.[15] But no such exactitude is required. This Court has made clear that "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes, supra*, 427 U.S. at 393.

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[14] For example, the statute in this case also requires that veterans claiming the exemption have served during specified periods of time and for at least 90 days. If appellants were correct in their attack on eligibility dates, veterans serving in peacetime or for less than 90 days could also insist on receiving the exemption.

[15] It is, for example, possible that someone who was born in New Mexico, left New Mexico well before the war, and then returned after May 8, 1976, would get the benefit denied to appellants, even though he did not establish any dependency on New Mexico at or around the time of the war. But, so long as a statute generally serves its intended purpose, its constitutionality need not depend on the occasional occurrence of an unlikely sequence of events. See, e.g., *Phelps v. Board of Education*, 300 U.S. 319, 324 (1937) (individual inequities do not violate equal protection clause).

In any event, quite apart from the issue of dates themselves, appellants' argument would effectively eliminate the rational basis test. If rationality were always to be judged by the degree of difference between persons on one side of a legislative line and those immediately on the other side, very few statutes would survive even minimum scrutiny. It is obvious, for example, that persons having one dollar more than the maximum allowed for receiving certain benefits have a claim that is virtually indistinguishable from persons having one dollar less. The essence of legislative line-drawing is to make those difficult choices.[16]

Appellants' position, at bottom, is not much different from that of any person disadvantaged by state legislation. Thousands of New Mexico citizens do not qualify for some state benefit or another because they fall on the wrong side of a legislative line. Appellants' problem is not that New Mexico drew an irrational line but that they do not benefit by it. The equal protection clause does not provide a remedy for that problem.

**3. The Issue of Severability, If Any, Is a Matter For the New Mexico Courts.**

Appellants argue that if this Court rules that the fixed-date residency requirement is unconstitutional, it should also rule that the requirement be excised from the statute, leaving the rest of the statute fully operative. In effect, appellants would have this Court rewrite N.M. Stat. Ann. § 7-37-5C(3) to make the property tax exemption available to any veteran who is a resident of New Mexico and who served during the Vietnam conflict. In our view, the New Mexico courts should resolve the question whether the fixed-date residency requirement is severable from the rest of the statute. Even if this Court

[16] Appellant is not himself just on the other side of the line. It is undisputed that he did not come to New Mexico until August 1981. J.S. App. B3.



may properly resolve the severability issue, however, we think it clear that the fixed-date residency requirement is not severable.

The question of severability is, quite obviously, a matter of State law.[17] In addressing the issue, the basic inquiry is whether the unconstitutional provision can be separated from the other provisions of the statute without impairing its effect, and whether the New Mexico legislature would have enacted the rest of the statute if it had known that it could not enact the unconstitutional provision.[18] The New Mexico courts are clearly in the best position to resolve these issues regarding the proper interpretation and revision of New Mexico law.

This Court reached a similar conclusion in *Zobel v. Williams, supra.* After ruling that retrospective application of Alaska's dividend distribution program was unconstitutional, it remanded to the Alaska courts the question whether the remainder of the program should be left operative. The Court did note that the Alaska legislature had left no doubt about the issue, since it had included a section expressly declaring any unconstitutional provision

[17] It is well-settled that state courts are the final arbiters of all questions regarding the proper interpretation of state law, and that federal court interpretations are not binding on the state courts. See, *e.g., Mullaney v. Wilbur*, 421 U.S. 684, 689 (1975); *Murdock v. Memphis*, 20 Wall. 590 (1875). Thus, even if this Court were to decide the severability issue, the New Mexico courts would still be free to reinterpret the statute.

[18] As a technical matter, New Mexico rules of statutory construction should be applied to determine whether a clause contained in a New Mexico statute is severable. Under New Mexico law, the unconstitutional portion of the statute will be regarded as severable if: (1) it can be separated from the other portions of the statute without impairing their effect; (2) the legislative purpose expressed in the valid portions of the act may be given effect without the invalid portion; and (3) the legislature would have passed the valid portions of the statute even if it had known that the objectionable part was invalid. *State v. Spearman*, 84 N.M. 366, 368, 503 P.2d 649 (N.M. Ct. App. 1972).

to be nonseverable. Despite this clear indication, however, this Court stated: "[I]t is of course for the Alaska courts to pass on the severability clause of the statute." 457 U.S. at 65.

Even if the Court should decide to resolve the severability question itself, it should not revise the statute to provide that every Vietnam veteran residing in New Mexico is entitled to the property tax exemption, regardless of the date of his arrival in the State. The New Mexico legislature passed this statute to assist New Mexico residents who left the State for service in the Vietnam war or who settled in New Mexico shortly after the war was over. The statute is thus consistent with the New Mexico statutes assisting veterans of other wars, none of which extends the benefits to veterans generally. The revision of the statute proposed by appellants would therefore expand the scope of the statute in a manner rejected by the legislature in over fifty years of enactments in this area. Rather than supplanting the New Mexico legislature and creating its own version of an acceptable veteran preference program, the Court should rule that the fixed-date residency requirement is not severable and that the entire statute must be struck down.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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